

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1888

UNITED STATES OF AMERICA

v.

JOSE ANTONIO ROTGER PEREZ,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 03-cr-00552)
District Judge: Honorable Franklin S. Van Antwerpen

Submitted Under Third Circuit LAR 34.1(a): November 19, 2004

Before: SCIRICA, *Chief Judge*, and
MCKEE and CHERTOFF, *Circuit Judges*

(Filed November 22, 2004)

OPINION

CHERTOFF, *Circuit Judge*.

After a jury was empaneled and sworn, opening arguments were completed, and two victims testified and identified Appellant Jose Antonio Rotger Perez as the man who

robbed them at gunpoint while they worked at a mini-market, Perez consulted with counsel, signed a written plea agreement, and pled guilty to the five armed robberies for which he was charged. One week later, he sent a letter to the District Court, seeking to withdraw his guilty plea. The District Court denied his request after an evidentiary hearing, and Perez appealed. We will affirm.

Once the District Court has accepted a guilty plea, it “may not automatically be withdrawn at the defendant's whim.” United States v. Brown, 250 F.3d 811, 815 (3d Cir. 2001) (citing United States v. Martinez, 785 F.2d 111 (3d Cir. 1986)). The Court must instead determine whether the defendant has “a fair and just reason for withdrawing a plea of guilty,” Fed. R. Crim. P. 32(e), considering the following three factors:

- (1) whether the defendant asserts his innocence;
- (2) whether the government would be prejudiced by the withdrawal; and
- (3) the strength of the defendant's reason to withdraw the plea.

Id. (citing United States v. Huff, 873 F.2d 709, 711 (3d Cir. 1989)). The burden is on the defendant to assert his innocence and reason to withdraw the plea. If he fails to do so, the government need not establish prejudice. United States v. Harris, 44 F.3d 1206, 1210 (3d Cir. 1995). “A shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons to impose on the government the expense, difficulty, and risk of trying a defendant who has already acknowledged his guilt by pleading guilty.” Brown, 250 F.3d at 815 (quoting United States v. Jones, 979 F.2d 317, 318 (3d Cir. 1992) (superseded by statute on other grounds)). The District Court’s “decision not to grant

such a motion will only be disturbed if the court has abused its discretion.” United States v. Isaac, 141 F.3d 477, 485 (3d Cir. 1998).

The District Court did not abuse its discretion when it determined that the Defendant did not provide any “fair and just reasons” for withdrawing his guilty plea. First, the Defendant never maintained his innocence, even at the evidentiary hearing regarding his plea withdrawal request. There, when asked whether he “in fact, commit[ted] each and every one of the robberies that [he] pled guilty to,” he answered, “Yes, I admitted to the ones that you had witnesses for, the people that testified here in the trial.” (App. 169; see also Appellant Br. at 13.) Second, the Defendant did not provide a “fair and just” reason for his withdrawal request. Instead, his assertion that he did not understand his plea because it was in English is belied by his competent representation by a bilingual attorney and the presence of a Spanish interpreter throughout the plea colloquy. Perez’s claim that he was “pressured” to plead guilty because he was told that he would otherwise face life imprisonment is negated by clear case law that “fear of substantial sentence” does not provide grounds to withdraw a plea, see Jones, 979 F.2d at 318. Finally, the Government would suffer prejudice if the Defendant were allowed to withdraw the plea he made mid-trial, as it would require the Government to duplicate its previous efforts if required to bring the case to trial before a new jury.

The District Court was within its discretion when it denied the Defendant’s request to withdraw his plea of guilty, and this Court will affirm.